



SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 34-92565]

PROCEDURES FOR THE COMMISSION'S USE OF CERTAIN AUTHORITIES UNDER RULE 21F-3(B)(3) AND RULE 21F-6 OF THE SECURITIES EXCHANGE ACT OF 1934

AGENCY: Securities and Exchange Commission.

ACTION: Policy statement.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is issuing this statement to clarify how the SEC will proceed when addressing certain issues under Exchange Act Rule 21F-3(b)(3) and Exchange Act Rule 21F-6 while the staff is preparing and the Commission is considering potential amendments to those rules (“Interim Policy-Review Period”). These procedures will remain in effect until withdrawn by the Commission.

DATES: The policy statement is effective: [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Emily Pasquinelli, Acting Chief in the Office of the Whistleblower, Division of Enforcement, at (202) 551-5973; William K. Shirey, Counsel to the Solicitor, Office of the General Counsel, at (202) 551-5043; Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Dodd-Frank Consumer Protection and Wall Street Reform Act of 2010 (“Dodd-Frank Act”), Section 21F was added to the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. 78u-1 *et seq.*, to establish a new SEC whistleblower award program. Section 21F provides that, pursuant to regulations adopted by the SEC, a monetary award shall be paid to any eligible whistleblower who provides the SEC with original information about a securities law violation that leads to the SEC’s success in obtaining a monetary order of more than a million dollars in an SEC judicial or administrative enforcement action (“covered action”). If an eligible whistleblower qualifies for an award, the SEC must pay an award that is at least 10%,

but no more than 30%, of the amount of the monetary sanctions collected in the SEC enforcement action.

Section 21F further provides that if the SEC makes a whistleblower award in connection with its own enforcement action, the whistleblower becomes potentially eligible for an award in connection with any related enforcement actions (“related actions”) that are successfully litigated using the whistleblower’s same original information. The potential related enforcement actions must be brought either by a self-regulatory organization or certain statutorily identified governmental authorities (such as the U.S. Department of Justice or a state attorney general in connection with a criminal proceeding).¹

In May 2011, the Commission adopted rules to govern the operation of the whistleblower award program. In September 2020, the Commission adopted various amendments to the Whistleblower Program rules, including two amendments that whistleblower advocates and others have asserted are unfair to whistleblowers and may risk reducing the willingness of individuals to blow the whistle. These amendments were made to: (1) Exchange Act Rule 21F-3, which addresses the criteria for making an award based on a whistleblower’s contributions to the successful resolution of a related action; and (2) Exchange Act Rule 21F-6, which establishes the criteria that the Commission may consider when determining the appropriate award amount.

- *Relevant Amendment to Exchange Act Rule 21F-3.* The 2020 Amendments added new subparagraph (c) to Rule 21F-3 to govern situations where a whistleblower has filed a claim for an award in connection with a potential related action but that action is potentially also covered by a second, separate award program (such as, for example, the federal whistleblower award program that the Internal Revenue Service administers, *see* 26 U.S.C. 7623). New paragraph (c) authorizes the Commission to determine, based on the facts and

¹ *See* Exchange Act 21F(a)(5) (defining related action); Exchange Act Rule 21F-3(b)(1) (same).

circumstances of the claims and misconduct at issue in the potential related action (among other factors), whether the Commission’s whistleblower program or the other whistleblower program has the more “direct or relevant connection to the [related] action.” And responsibility for making an award in connection with the potential related action will then rest with whichever award program is determined to have the more direct or relevant connection to the action.

- *Relevant Amendment to Exchange Act Rule 21F-6.* The 2020 Amendments added language to permit the Commission to consider, in its discretion, the dollar amount of a potential award when making an award determination. Before this amendment, the text of the rule (with one limited exception) did not expressly afford the Commission authority to consider the potential dollar amount of an award when determining awards; rather, the text of the rule generally referred to setting awards as a percentage of the monetary sanctions recovered.

II. Procedures Available During the Interim Policy-Review Period

On August 2, 2021, Chair Gensler issued a public statement advising that he has directed the staff to prepare for the Commission’s consideration later this year potential changes to Rules 21F-3(b)(3) and Rule 21F-6 to address policy concerns raised by whistleblower advocates and others about possible adverse effects of the 2020 Amendments.²

While the staff is preparing and the Commission is considering potential additional rulemaking, the procedures discussed below are available to whistleblowers with claims pending during the Interim Policy-Review Period so that they are not disadvantaged under the components of Rule 21F-3(b)(3) and Rule 21F-6 that may be revised. These interim procedures

² See also SEC’s Spring 2021 Regulatory Agenda (publicly available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AN03>) (“The Commission is considering additional amendments to the rules governing the Whistleblower Program established by the Dodd-Frank Act.”).

are consistent with the SEC's overarching goal of protecting investors and the United States capital markets by encouraging whistleblowers to come forward to report violations of the federal securities laws and then rewarding them when their information leads to successful enforcement actions.

A. Exchange Act Rule 21F-3(b)(3)

For any claim that may be subject to Rule 21F-3(b)(3) during the Interim Policy-Review Period, the Commission directs as follows:

1. Before providing a preliminary determination to a claimant, or a proposed recommendation to the Commission, the staff shall consider whether to recommend that the Commission's exemptive authority under Section 36(a) of the Exchange Act³ should be utilized to permit an award on a potential related action irrespective of the limitations of Rule 21F-3(b)(3) if:

(a) the alternative whistleblower program has an award cap or award range that could disadvantage the particular claimant;⁴ or

(b) the Commission is aware or the claimant demonstrates a likelihood that a condition or exclusion would apply to his or her award claim under the alternative award program and the staff determines that the claimant would

³ In pertinent part, Section 36(a) provides that "by rule, regulation, or order, may conditionally or unconditionally exempt any person ... from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

⁴ See, e.g., 12 U.S.C. 4205(d)(1) (establishing a whistleblower award program in connection with the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, but capping awards at \$1.6 million).

likely obtain an award were he or she permitted to proceed under the SEC's award program.

2. For any other award claim under Rule 21F-3(b)(3) for which the staff determines that an alternative whistleblower program has a "more direct or relevant connection" to the potential related action than the Commission's award program does, the staff will inform the claimant of its assessment. The claimant may then request that the related-action award claim held in abeyance during the Interim Policy-Review Period.⁵ Further, any related-action award claim that is held in abeyance shall not impact the timely processing of any award claim arising from a covered Commission enforcement action that is successfully litigated using the claimant's same original information.

B. Exchange Act Rule 21F-6

With respect to Rule 21F-6, the Commission at the time it adopted the 2020 rulemaking amendments explained that the amendment in question was a clarification of discretionary authority the Commission already possessed.⁶ The Commission anticipates that, going forward, it will continue its practice of considering dollar amounts only in connection with provisions of the rules that explicitly contemplate the use of such discretion to raise awards (*i.e.*, law enforcement interest prong of 21F-6(a)(3) and the application of the presumption embodied in Rule 21F-6(c)). In the unlikely event that the staff or the Commission should consider deviating from this practice, the staff will inform the claimant that such action is being considered. The

⁵ The Commission contemplates that there should be no impact on the timely processing of any related-action award claim that the staff deems to have a "more direct or relevant connection to the Commission's whistleblower program." However, if a majority of the Commission should subsequently disagree with that determination, the claimant shall be notified and may request to have the related-action award claim held in abeyance during the Interim Policy-Review Period.

⁶ The extent to which the amendment was a clarification was a point of disagreement at the time that the Commission adopted the amended rules in 2020.

claimant may then request that the matter be held in abeyance during the Interim Policy-Review Period.

III. Other Matters

Publication for notice and comment is not required under the Administrative Procedure Act (“APA”) pursuant to the exemption for agency rules of organization, procedure, or practice.⁷ It follows that the requirements of the Regulatory Flexibility Act do not apply.⁸ The effective date is [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER PUBLICATION. In accordance with the APA,⁹ we find that there is good cause to establish an effective date less than 30 days after publication. The Commission believes that establishing an effective date less than 30 days after publication of this document is necessary to clarify how the SEC will proceed when addressing certain issues under Exchange Act Rule 21F-3(b)(3) and Exchange Act Rule 21F-6 while the staff is preparing and the Commission is considering potential amendments to those rules.

The Commission has determined that the foregoing relates only to agency procedures and does not substantially affect the rights or obligations of non-agency parties. The foregoing is therefore not a “rule” under the Congressional Review Act, 5 U.S.C. 804(3)(C).

Finally, the Commission has adopted the foregoing under the authority set forth in Sections 3(b), 21F, and 23(a) of the Exchange Act.

By the Commission.

August 5, 2021.

⁷ 5 U.S.C. 553(b)(A).

⁸ 5 U.S.C. 601-612.

⁹ 5 U.S.C. 553(d)(3).

Vanessa A. Countryman
Secretary

[FR Doc. 2021-17019 Filed: 8/12/2021 8:45 am; Publication Date: 8/13/2021]